

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

CARL J. FISHER,  
Appellant,

v.

DEPARTMENT OF DEFENSE,  
Agency.

DOCKET NUMBER  
PH122190W0645

DATE: APR 12 1991

Carl J. Fisher, Pittsburgh, Pennsylvania, pro se.

Paul N. Bley, Esquire, Alexandria, Virginia, for the  
agency.

BEFORE

Daniel R. Levinson, Chairman  
Antonio C. Amador, Vice Chairman  
Jessica L. Parks, Member

OPINION AND ORDER

This case is before the Board on the appellant's petition for review of the November 21, 1990, initial decision that denied his Individual Right of Action (IRA) appeal. We DENY the petition for review because it fails to meet the Board's criteria for review. 5 C.F.R. § 1201.115. For the reasons set forth below, however, we REOPEN the appeal on our own motion under 5 C.F.R. § 1201.117, VACATE the initial decision, and DISMISS the appeal for lack of jurisdiction.

### BACKGROUND

The appellant is a GS-12 Senior Auditor with the Defense Contract Audit Agency. He was suspended for five days, effective March 26, 1990, based on the following charges:

- (1) Intentionally failing to follow procedures and obtain approval for unscheduled annual leave, resulting in his being charged absent without leave on February 14, 1990;
- (2) refusing to follow and obey legitimate orders; and
- (3) disorderly conduct. See Agency File, Tabs 4b and c.

The appellant filed an IRA complaint with the Office of Special Counsel (OSC) alleging that the suspension constituted reprisal for whistleblowing activities. He claimed that the whistleblowing occurred when, in the context of internal agency grievances and Equal Employment Opportunity (EEO) complaints, he reported alleged improper management actions. OSC, finding insufficient evidence of any prohibited activity warranting its further inquiry, closed its file. See Appeal File, Tab 1. The appellant, thereafter, filed a timely appeal with the Board's Philadelphia Regional Office.<sup>1</sup> *Id.*

In his initial decision, the administrative judge relied on the Board's decision in *Williams v. Department of Defense*, 45 M.S.P.R. 146, 149 (1990), to find that the appellant's filings of EEO complaints and internal agency grievances

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<sup>1</sup> The action at issue, a five-day suspension, is not an action otherwise appealable to the Board. See 5 U.S.C. § 7512(2). Therefore, except to the extent that it can be considered in the context of an IRA appeal, the Board lacks jurisdiction to review this matter.

constituted protected disclosures under the Whistleblower Protection Act (WPA). See Initial Decision (I.D.) at 4. The administrative judge found, however, that the appellant failed to establish a prima facie case of reprisal for whistleblowing activities because he did not demonstrate that his disclosures were a contributing factor in the agency's decision to suspend him. *Id.* at 4-12. Accordingly, the administrative judge denied the appeal.

#### ALLEGATIONS ON PETITION FOR REVIEW

In his petition for review, the appellant disputes the administrative judge's finding that he did not establish a prima facie case of reprisal based on whistleblowing.

#### ANALYSIS

The Board recently reconsidered its earlier holding in *Williams v. Department of Defense*, 45 M.S.P.R. 146 (1990), that an appellant's protected activity -- the filing of an EEO complaint -- was a disclosure covered by the provisions of 5 U.S.C. § 2302(b)(8).<sup>2</sup> Upon further review, the Board reversed its 1990 *Williams* decision. See *Williams v.*

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<sup>2</sup> Section 2302(b)(8) proscribes the taking of a personnel action because of:

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences --

(1) a violation of any law, rule, or regulation....

Department of Defense and Office of Personnel Management (Intervenor), MSPB Docket No. NY075290S0119 (Jan. 7, 1991). The Board reasoned that, if the employee filing a grievance, EEO complaint, or appeal were protected against reprisal by section 2302(b)(8), there would be no need for the section 2302(b)(9)<sup>3</sup> protections, and that to interpret section 2302(b)(8) literally would both broadly override and make redundant the provisions of section 2302(b)(9). See *Williams*, slip op. at 6-7. The Board further considered the legislative history of the WPA and found that such a broad interpretation was not intended. *Id.* at 8-9. The Board thus concluded that the filing of an EEO complaint does not constitute whistleblowing under section 2302(b)(8).

Unlike the appellant in this case, the appellant in *Williams* only filed an EEO complaint and did not additionally file an internal agency grievance. Nevertheless, we find that the same reasoning applies to exclude the filing of grievances from section 2302(b)(8) protection. In other words, if the employee filing an agency grievance were protected against reprisal by section 2302(b)(8), there would be no need for the section 2302(b)(9) protections which specifically include the filing of grievances. The section would be rendered redundant, and, as we found in *Williams*, a review of the legislative history of the WPA suggests that such a broad

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<sup>3</sup> Section 2302(b)(9) protects, at subsection (A), "the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation."

interpretation was not intended. Thus, we find that the filing of a grievance does not constitute whistleblowing under section 2302(b)(8).

Since 5 U.S.C. § 1221(a) provides for the filing of an IRA appeal only where the employee, former employee, or applicant for employment claims reprisal under section 2302(b)(8), and since the appellant's claims of reprisal are based on his protected filings which do not constitute whistleblowing under section 2302(b)(8), we find, under the circumstances, that the Board lacks jurisdiction to consider his IRA appeal.

#### ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

#### NOTICE TO APPELLANT

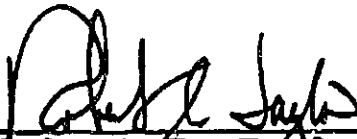
You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, DC 20439

The court must receive your request for review no later than

30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

  
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Robert E. Taylor  
Clerk of the Board

Washington, D.C.